No. ____

In The

Supreme Court of United States

LEONYER RICHARDSON

Petitioner,

v.

COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, ET. AL.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a violation of Title VII of the Civil Rights Act of 1964 for an employer and union to negotiate a clause that requires employee election of remedies as between the grievance/arbitration provision of their contract and rights secured by Title VII or state anti-discrimination laws?

PARTIES TO THE PROCEEDING

Petitioner is Leonyer Richardson. She is plaintiff in the District Court and appellant in the Court of Appeals. She brings this action on her own behalf.

Respondents are State of Connecticut, Office of Policy and Management, Commission on Human Rights & Opportunities, and its Executive Director Cynthia Watts-Elder, Leanne Appleton, Donald Bardot, Linda Yelmini, Administrative and Residual Employees Union. They were defendants in the District Court and appellees in the Court of Appeals.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals (App. A) is reported at 532 F.3d_114 (2nd Cir. 2008). The decision of the District Court (App. C) is found at (D. Conn. 2005).

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 states:

a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's race, color, religion, sex, or national origin; or

c) Labor organization practices

It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

2. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

This case presents questions about whether an employer and a labor union may negotiate an election of remedies clause in a collective bargaining agreement that requires a cessation of any grievance arbitration proceedings if the employee files a claim of discrimination under Title VII of the Civil Rights Act of 1964 as amended or a similar state anti-discrimination statute. The

Seventh Circuit Court of Appeals has resolved this issue by concluding that a collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity (i.e. ADEA). Citing the decision of this Court in *Alexander v. Gardner-Denver,* the Seventh Circuit further discussed the well-established principle that neither the employer or a union can be permitted to waive a employee's statutory rights.

By contrast, the Second has split on this issue of profound national importance, holding that a union and an employer are not precluded from agreeing that employees must forego their right to arbitrate a grievance if they bring an administrative or judicial action arising out of the same facts. Other Circuits, notably the First and Sixth, have held that a clear and unmistakable waiver foreclosing employee entitlement to a judicial forum may be negotiated.

I. FACTUAL BACKGROUND

A. Plaintiff

Plaintiff, Leonyer M. Richardson, was employed as a fiscal administrative officer by the Connecticut Commission on Human Rights & Opportunities (the state anti-discrimination deferral agency). She was a member of a bargaining unit represented at all material times by Administrative and Residual Employees Union (hereafter "A&R"). Richardson was terminated from state employment at a time when she had a pending charge of race discrimination against her employer and a pending grievance. Upon learning that Richardson had filed an administrative charge of discrimination, her union

withdrew her contract grievance at the Third Step, in reliance upon a contract clause that prohibited an employee from continuing in the grievance/arbitration forum whenever an administrative or judicial charge is filed.

B. The Employer and Union Negotiated Policy and Practice

The State of Connecticut, Office of Policy and Management (hereafter "OPM") has been party to a collective bargaining agreement with A&R Union containing a contract clause that reads in pertinent part:

> "[n]otwithstanding any other provision of this Agreement, the following matters shall be subject to the grievance procedure but not to arbitration: ... (2) disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on Human Rights and Opportunities arising from the same common nucleus of operative fact.

Both OPM, the Union and the Employer (CHRO) have consistently argued that their negotiation, execution and maintenance of this clause in the collective bargaining agreement is not prohibited.

II. PROCEEDINGS BELOW

A. The District Court

On April 9, 2002 Richardson filed an employment discrimination complaint against C.H.R.O., several of its employees, the State Office of Policy and Management, and her Union. On March 31, 2005 the District Court granted a

Motion for Summary Judgment in favor of all defendants. The district court concluded that the contract clause was protected by the Federal Arbitration Act. The District Court further determined that there was no discrimination or retaliation against Richardson by any of the defendants.

B. The Court of Appeals

On appeal to the Second Circuit Court Richardson argued that the contract clause requiring an election of remedies or forum selection was not saved by the Federal Arbitration Act and in fact was both discriminatory and retaliatory. Richardson also argued that the District Court had made reversible errors of law in finding that the underlying termination of her employment violated Title VII. In a panel decision the court concluded that the union did not discriminate against Richardson by adhering to the election-of-remedies provision after she chose to file a charge with the CHRO. Further the Court found that the contract clause did not constitute a waiver of any statutory rights under *Gardner-Denver*, and that the defendants' withdrawal from arbitration was not retaliatory because the forum-selection clause was a reasonable defensive measure to avoid duplicative proceedings.

Richardson timely filed a request for hearing en banc. On October 30, 2008 the request was denied.

II. The *Gardner-Denver* Case.

While noting the tension between the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory (including retaliatory) employment

practices, this Court resolved that tension a generation ago by holding that the doctrine of election of remedies has no applicability in the context of enforcement of employee statutory rights. In *Alexander v. Gardner-Denver*, 415 U.S. 36, 47 (1974) this Court held that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance/arbitration clause of a collective bargaining agreement and his cause of action under Title VII." The distinct nature of contract rights under a collective bargaining agreement and those under anti-discrimination statutes, even resulting from the same factual occurrence, requires the freedom of employees to simultaneously pursue claims in both fora.

The tension between the two policies was again noted and resolved in favor of dual remedies in the context of other statutory rights such as minimum wage provisions under the Fair Labor Standards Act in *Barrentine v. Arkansas-Best Freight System, Inc.* 450 U.S. 728 (1981).

Lower courts have begun to obscure the right of union represented employees to be free from retaliation for attempting to enforce their statutory rights. This has occurred in part because of this court's line of cases regarding arbitration clauses that allow the mandatory waiver of statutory rights and dicta that suggests that a union may waive employees' rights to a federal judicial forum for statutory antidiscrimination claims when the agreement to arbitrate such claims is "clear and unmistakable". Compare *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). This Court has specifically declined to reach the question whether a

collective bargaining agreement may encompass the waiver of employment discrimination claims.

REASONS FOR GRANTING THE WRIT

The congressional objective of Title VII is that all employees have a statutory right to be free from discrimination and retaliation. The anti-retaliation provision of Title VII are an important means of assisting the EEOC in its enforcement work and is largely dependent upon individual employee cooperation. There is no sound basis for differentiating between the enforcement of statutory rights of those employees who are represented by a labor union. There is now a sharp disagreement among the circuit courts about whether an employer and labor union may be permitted to abridge statutory rights by retaliating against an employee who chooses to utilize grievance/arbitration fora in addition to or simultaneously with judicial or administrative fora.

The Seventh Circuit has held that a collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity and that such clauses are retaliatory *per se*. Conversely, the Second Circuit has held that a union and an employer are not precluded from agreeing to a contract clause that requires employees to forego their right to arbitrate a grievance if they bring a lawsuit in federal court arising out of the same facts. *EEOC v. Board of Governors of State Colleges & Universities*, 957 F.2d 424 (7th Cir. 1992), Cert denied 506 U.S. 906 (1992).

Conversely, in *Richardson*, the Second Circuit has found the same type of contract clause to be lawful and non-

retaliatory. While only the Seventh and Second Circuits have dealt directly with the precise issue of whether such contract clauses violate the anti-discrimination laws, other Circuits have appeared to gingerly deal with the legality of contract clauses that appear to require a waiver of employee statutory rights. These decisions have arisen in varying contexts such as mandatory arbitration agreements, and motions to compel arbitration.

The Fourth Circuit has held that a union-negotiated collective bargaining agreement may waive an employee's statutory right to litigate his employment discrimination claims in a judicial forum, thus implicitly finding no retaliation. *Eastern Associated Coal Corp. v. Massey,* 373 F.3d 530 (4th Cir. 2004).

In *Wedding v. University of Toledo*, 89 F.3d 316 (6th Cir. 1996), the District Court had found unlawful a contract clause that stated "[i]f a grievant seeks relief through a judicial or administrative forum outside of this grievance procedure for a subject matter covered by a grievance, the processing of the grievance shall be held in abeyance until the outside forum has issued a final determination or unless both the Employer and [the union] agree otherwise." On appeal to the Sixth Circuit, it was held that the District Court had reached this conclusion prematurely and that because the parties had contracted to have disputes settled by an arbitrator rather than a judge, those procedures must first be exhausted, citing the Steelworkers' Trilogy. Thus, the Circuit failed to reach the ultimate issue of whether the clause was unlawful.

While also noting the tension between federal labor policy and federal anti-discrimination policy, other lower courts have side-stepped the matter of whether collective

bargaining agreements may directly waive or cause an election of remedies by employees. *See, e.g.*, *O'Brien v. Town of Agawam*, 350 F.3d 279, 285 (1st Cir. 2003) ("The *Wright* Court declined to resolve this tension [between enforceability of mandatory arbitration clauses in individual contracts and those in CBAs], holding that even assuming a CBA can waive an employee's right to a federal forum, any such waiver must at a minimum be "clear and unmistakable."); *Mitchell v. Chapman*, 343 F.3d 811, 824 (6th Cir. 2003) ("Assuming *arguendo*, that the CBA mandates binding arbitration, it is well-established that the CBA must contain a 'clear and unmistakable waiver' of [Family and Medical Leave Act] rights to foreclose entitlement to a judicial forum."); *Tice v. Am. Airlines, Inc.*, 288 F.3d 313, 317 (7th Cir. 2002) (citing *Gardner-Denver*, but noting the ambiguity in the CBA language); *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 522 (7th Cir. 2001) (holding that "a union cannot surrender employees' rights under Title VII").

The issue as seen by the Second Circuit in *Richardson* was "... whether Title VII of the Civil Rights Act of 1964 forbids the inclusion of an election-of-remedies provision in a collective bargaining agreement, or, in the alternative, whether adherence to that provision constitutes discrimination".

The *Richardson* court distinguished between (a) the law governing contracts that purport to release or waive Title VII rights and (b) the law governing employer actions taken in retaliation for employee opposition to unlawful employment practices, including the filing of charges with the EEOC or its state analogues.

Richardson creates an affirmative defense to what would otherwise be retaliatory action by concluding that the contract clause was a reasonable defensive measure by the employer to avoid duplicative proceedings in two fora. Further, the union was accorded an affirmative defense based upon the court's view that "...it also makes sense that a union might want to deploy its scarce resources selectively." *Gardner-Denver* recognized this very type of situation in whi h "the interest of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Gardner-Denver,* 415 U.S. at 58, n. 19).

As noted by the Seventh Circuit in *U.S.E. E. O. C. v. County of Calumet*, 686 F.2d 1249 (7th Cir. 1982) "[r]ights conferred by Congress on a class of individuals vulnerable to discrimination are endangered if they may be waived by a majority vote, and because the principle of majority rule is central to the collective bargaining process, the possibility always exists — by design — that the majority will subordinate the interests of the minority".

Leaving protected class employees in unionized workforces subject to collectively bargained agreements that require to choose between contract rights and statutory rights would leave implementation of Title VII "...sporadic and unpredictable, depending almost entirely on the economic bargaining strength of the union, the incentives offered in exchange for these statutorily conferred rights, and the intensity of management attitudes toward the Act." *U.S.E. E. O. C. v. County of Calumet, Id.* Thus the affirmative defense found acceptable by the *Richardson* court would permit a union to barter the individual rights of a few members in order to reduce the financial obligations of many others.

The kind of contract clause found by the *Richardson* court to be acceptable violates Title VII because it discriminates against protected class employees. This is so because only those employees who are protected by state and federal anti-discrimination statutes are deprived of the contract right to the grievance/arbitration procedures. Non-protected class employees could fully utilize the grievance/arbitration process and still retain their right, for example, to file a whistleblower claim under Sarbanes-Oxley.

The type of clause at issue in *Richardson* is also facially retaliatory. This was the finding of the Seventh Circuit in *Board of Governors*. As noted by that court, such contract clauses deprive claimants of a term or condition of employment available to others and deter them from exercising their rights under the anti-discrimination laws. *Board of Governors* and *Richardson*, on almost identical facts, stand in sharp contrast regarding whether an employee suffers an adverse employment action when they are required to forego one of the remedies for discrimination that is available to them. See also *Fasold v. Justice*, 409 F.3d 178 (3rd Cir. 2005) (Finding that Fasold was subject to an adverse employment decision when his Level II grievance was denied).

The anti-retaliation provisions examined in *Board of Governors* and *Richardson* are analogous. Section 4(d) of the ADEA, the provision at issue in *Board of Governors*, parallels Section 704(a), Title VII and provides:

> It shall be unlawful for an employer to discriminate against any of his employees because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner

in an investigation, proceeding, or litigation under this chapter. 29 U.S.C. § 623(d).

The purpose of the anti-retaliation provision of Title VII is to secure enforcement of the Act's basic guarantees by "maintaining unfettered access" to statutory remedial mechanisms". In *Burlington Northern* this Court agreed that unfettered access to the statutory remedial mechanisms would be best served by a broad scope of the anti-retaliation provision permitting employees to challenge any employer (or labor union) action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination". *Burlington Northern Santa Fe Railway v. White,* 548 U.S. 53 (2006).

Where a union represented employee chooses to assert Title VII rights, it cost that employee something; the right to proceed in the contractually guaranteed binding arbitration that controls the outcome of an ultimate employment decision. Under *Burlington Northern*, a reasonable employee/union member would be deterred from exercising their rights under Title VII in the face of such a required election of remedies.

In *Richardson*, notably it was also admitted that Defendant Office of Labor Relations had a 15 year history that "where it was known that the grievant had made a claim of discrimination and at the same time filed a complaint with CHRO, the grievance was *denied*." A causal connection between the challenged contract clause and the protected activity was irrefutably established. Under well-established principles, a showing that the adverse action directly followed the filing of an administrative charge is sufficient to establish the requisite causal connection. This denial of a grievance is clearly an

adverse employment action based solely upon the protected activity of filing a discrimination complaint without regard to the merits of the grievance. This is particularly true since the contract clause at issue prohibited arbitration but permitted use of the grievance procedure. By prohibiting arbitration of grievances that involve statutory rights, the Defendant-Union, OPM and CHRO impermissibly forced employees to forego a contract right (arbitration) should they choose to exercise their statutory rights.

The Second Circuit, and those circuits that have been reluctant to find such clauses unlawful because of the *Gilmer / Circuit City / Wright* line of cases, has created the anomaly that protected class unionized workers suffer an adverse employment action, a change for the worse in the terms and conditions of their employment solely and directly because of their decision to engage in the protected activity of exercising their statutory rights.

The Second Circuit appeared troubled that the anti-retaliation provision protects employees from particular acts of discrimination that are retaliatory and that discrimination claims require courts to consider details such variables as the intent of the employer. However, the absence of malevolent intent has not been found by this Court to provide a justification for discrimination or retaliation. *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). An employer's reasons for adopting the challenged policy are irrelevant to the policy's legality. Nothing in Section 4(d) of ADEA or Section 704(a) requires a showing of intent in retaliatory policy cases contrary to the concern of *Richardson*. Moreover, not even "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free not to provide the benefit at all." *Hishon v. King & Spalding*, 467 U.S.

69, 75 (1984). Once a contract right to a grievance-arbitration procedure has been given to employees, the withholding of that right constitutes an adverse employment action.

THIS CASE PRESENTS ISSUES OF FUNDAMENTAL NATIONAL IMPORTANCE

This case presents the question whether employees in unionized workplaces may be discriminated against or retaliated against by way of a collective bargaining agreement that requires them to select between the grievance/arbitration procedure or an administrative/judicial procedure with respect to discrimination claims.

More than forty years ago Congress enacted Title VII of the Civil Rights Act of 1964 to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971). The paramount importance of these statutory rights for unionized employees has been recognized by this Court since *Gardner-Denver*. Employees who have chosen to be represented by a labor union must not be penalized by a judicial ruling, such as *Richardson*, that permits their employer and union to bargain away statutory rights that single them out for adverse employment action.

The federal policy favoring arbitration of labor disputes is concerned with the majoritarian process and must be limited to workplace matters that are truly collective in nature. The long history of union

discrimination against minorities and women prompted Congress to include unions within the reach of the statutory prohibitions against discrimination. As noted by the dissent in *Barrentine,* this long history of discrimination by labor unions, "...it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens". *Barrentine,* Id.

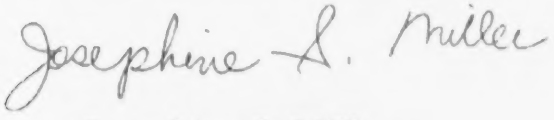
Collective bargaining clauses that require an employee election of remedies regarding discrimination claims are retaliatory *per se* because they embody a policy that wrests away from unionized employees who happen to be within a protected category (i.e. race, color, religion, sex, or national origin) something that is available to their co-workers who happen to not be within those protected categories (i.e. the contractual right to utilize the grievance/arbitration procedure). Such contract clauses would deter employees from engaging in the exercise of their statutorily conferred rights and would render less effective, the important work of EEOC in enforcement of anti-discrimination laws. While the arbitral forum works well for defining and applying the law of the shop, it is an inferior means of enforcing the Title VII and other anti-discrimination laws. *Gardner-Denver*, Id.

The issue is ripe for decision by this Court to resolve once and for all time the tension between *Gardner-Denver* and more recent precedent such as *Wright v. Universal Maritime.*

CONCLUSION

Because this case presents an important issue of federal law upon which the circuits are divided, and which should be settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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